

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1379

To be argued by
NATHANIEL H. AKERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1379

UNITED STATES OF AMERICA,

—v.—

CLARK BRACEWELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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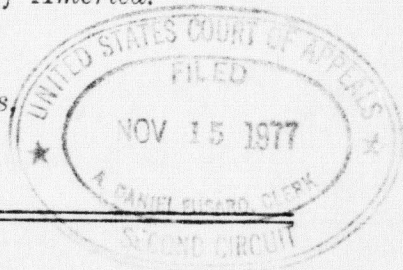


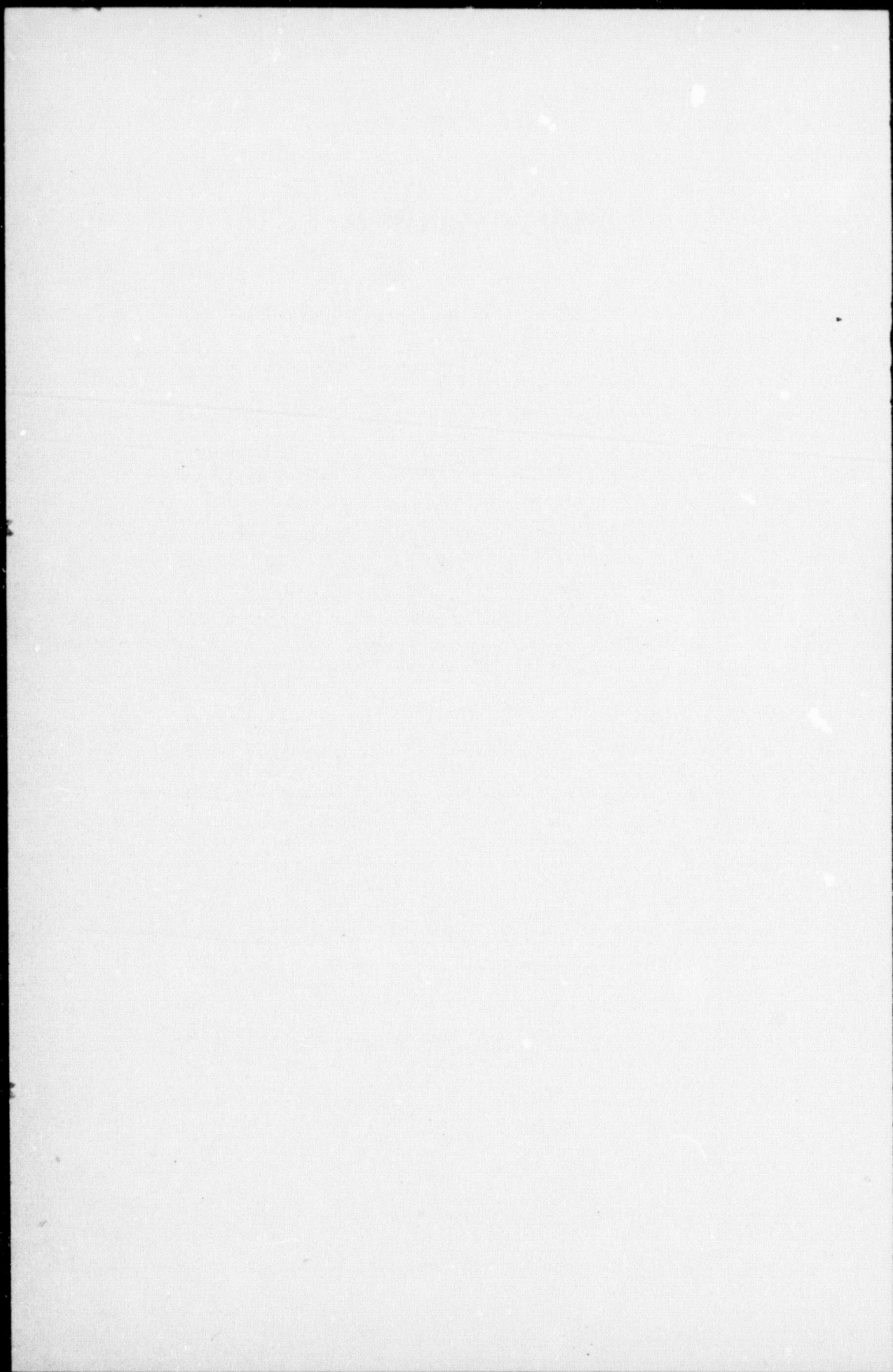


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**United States Court of Appeals
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Docket No. 77-1379

UNITED STATES OF AMERICA,

Appellee,

—v.—

CLARK BRACEWELL,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Clark Bracewell appeals from an order entered on August 12, 1977 in the United States District Court for the Southern District of New York by the Honorable Charles H. Tenney, United States District Judge, directing that \$1,950 seized from the defendant Bracewell at the time of his arrest on narcotics charges be deposited in the Treasury of the United States pursuant to Title 18, United States Code, Section 3006A(f), as reimbursement for the funds paid to his court appointed attorney.

Statement of Facts

Indictment S 76 Cr. 863, filed on December 9, 1976, charged Bracewell with three counts of violating the federal narcotics laws. Trial commenced on December 20, 1976, and on December 22, 1976 the jury found the defendant guilty on all three counts. On February 4,

1977, Judge Tenney sentenced Bracewell to concurrent terms of imprisonment of four years on each count, to be followed by three years of special parole.

At the sentencing Bracewell moved for the return of \$1,950 seized from him at the time of his arrest. The Government responded to the defendant's motion by stating:

"The Government will return the money once it has been determined that there will be no further appeal, and further, that the English authorities are not interested in prosecuting Mr. Bracewell, since this money would clearly be evidence if there was a new trial or if the English authorities were interested in prosecuting Bracewell, or indeed, if the Internal Revenue Service of Great Britain were interested in attaching that money since I believe Mr. Bracewell did not pay taxes on the sale of that hash oil in England." (Tr. 364).*

Judge Tenney specifically found that the Government was entitled to keep the \$1,950 in its possession until Bracewell's appeal was exhausted and until the Government was assured that there were no other claims against the money. (Tr. 369). On February 10, 1977, several days after the sentence the Government supplemented its sentencing statement by sending Judge Tenney a letter requesting that pursuant to 18 U.S.C. § 3006A(f) the Court apply the \$1,950 for reimbursement of Bracewell's court appointed counsel. Judge Tenney did not act upon the Government's letter.

On appeal Bracewell asked this Court to direct that the \$1,950 be returned to him. The Government opposed this request in its appellate brief, stating that at the

* "Tr.", refers to references in the official transcript in *United States v. Bracewell*, S 76 Cr. 863.

conclusion of the appeal the Government intended to make a formal motion before Judge Tenney pursuant to 18 U.S.C. § 3006A(f) requesting that the \$1,950 be applied for reimbursement of Bracewell's court appointed attorney. On May 4, 1977, this Court affirmed Bracewell's conviction and wrote the following in an unpublished opinion:

"We also agree with the Government that it's entitled to hold the \$1,950 involved, to be applied to the reimbursement of Bracewell's assigned counsel." *United States v. Bracewell*, Dkt. No. 77-1074, unpublished opinion (2d Cir., May 4, 1977).

On June 23, 1977, the Government moved pursuant to 18 U.S.C. § 3006A(f) requesting that the \$1,950 be deposited in the United States Treasury as a reimbursement for the services of Bracewell's court appointed counsel. Judge Tenney granted the motion on August 11, 1977. Bracewell's court appointed counsel had received \$1,164.27 for representing Bracewell at the trial, and \$800 for the appeal. (See Affidavit of Assistant United States Attorney Akerman filed with the District Court on June 23, 1977).

ARGUMENT

The District Court Acted Properly In Ordering That The \$1,950 Seized From Bracewell At The Time Of His Arrest Be Paid To The Treasury of the United States For Reimbursement Of Bracewell's Court Appointed Attorney.

The defendant Bracewell asserts that Judge Tenney abused his discretion by ordering that the \$1,950 seized from him at the time of his arrest be paid to the Treasury of the United States for reimbursement of his court ap-

pointed counsel.* Specifically, Bracewell argues that it was erroneous for Judge Tenney to grant the Government's motion when representations had been made by the Government at the time of sentencing that it would return the money to Bracewell after his appeal was final and once it was determined that the English authorities had no claim to the funds. He further argues that the District Court is estopped from ordering the reimbursement for court appointed counsel since the court knew of the existence of this money, but still authorized the appointment of counsel. These claims are without merit.

The express terms of 18 U.S.C. § 3006A(f) provides for the precise action taken by the District Court:

"Whenever the . . . court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney . . . or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section."

This statute vests with the District Court broad authority to order that money belonging to a defendant who received court appointed counsel be used to reimburse the Treasury for the costs of that representation. *United*

* The \$1,950 consisted of \$950 in cash and a \$1,000 Western Union money order found on Bracewell when he was arrested by Drug Enforcement Administration agents. (Tr. 209-11). Bracewell had attempted to use the money order as bail for a co-conspirator Helen Brown. Brown had been arrested prior to Bracewell. (Tr. 184-87, 209-12). Brown testified at the trial in *United States v. Bracewell*, that she and Bracewell had smuggled hashish into the United States. (Tr. 59-67).

States v. Durka, 490 F.2d 478, 479 (7th Cir. 1973).^{*} The statute embodies the sound policy that the federal courts should exercise their discretion to require defendants who have received free legal counsel to reimburse the Treasury if the court should discover after the appointment of counsel that a defendant has assets that can be used to compensate an attorney.

There is nothing to suggest that Judge Tenney acted improperly or abused his discretion in ordering that the \$1,950 seized from Bracewell be turned over to the Treasury. This Court has already stated that the \$1,950 should be applied to the reimbursement of Bracewell's assigned counsel, and Bracewell advanced no reason why the District Court should not follow this Court's decision.^{**}

^{*} Courts have invoked the provisions of 18 U.S.C. § 3006A (f) after judgment when it becomes apparent that the defendant has the funds to compensate the court appointed attorney. In *United States v. Wetzel*, 488 F.2d 153 (8th Cir. 1973) the Court of Appeals ordered that the defendants pay the costs of appeal including attorney's fees paid under the Criminal Justice Act because the defendants had received in excess of \$19,000 for the stolen cattle they had transported in interstate commerce. The trial court had imposed costs pursuant to 18 U.S.C. § 3006A(f) because of real estate owned by the defendants. See also *United States v. Durka*, *supra* 490 F.2d at 479.

^{**} This Court has held that the law of the case doctrine applies to issues specifically presented to and decided by this Court, and that the use of this doctrine is discretionary in that this Court can revise an earlier ruling if new evidence is presented. *Jhirad v. Ferrandina*, 536 F.2d 478, 483 (2d Cir. 1976); *United States v. Furey*, 514 F.2d 1098, 1102 (2d Cir. 1975). The District Court of course has no discretion and must accept the law of the case as established by the appellate court. *United States v. Fernandez*, 506 F.2d 1200, 1203 (2d Cir. 1974). Bracewell raised as an issue in his initial appeal the propriety of the District Court's refusal to return the \$1950 to Bracewell, and specifically argued that the money should not be retained by the Government under 18 U.S.C. § 3006A(f). The Government argued in its brief that Judge Tenney did not err in refusing to

[Footnote continued on following page]

Bracewell's reasons for opposing Judge Tenney's order are meritless. He makes much of the fact that the District Court without Government opposition appointed assigned counsel despite knowledge of the \$1,950. Since the \$1,950 had potential evidentiary value, it is obvious that the money could not be returned to Bracewell prior to trial so he could use that money to pay for counsel. Moreover, the fact that the order was entered after Bracewell's appeal is of no consequence. See *United States v. Durka, supra*, 490 F.2d at 478; *United States v. Wetzel, supra*, 488 F.2d at 153. Bracewell certainly suffered no prejudice because the money was transferred to the Treasury for reimbursement of his assigned counsel after his appeal rather than at an earlier time.

Bracewell's further argument that the reimbursement order is improper because the Government had represented at sentencing that it would eventually return the \$1,950 is similarly unavailing. The Government had represented at sentencing that it would return the \$1,950 after the appeal was final and after it was determined that the English authorities had no claim to the money. Bracewell had been told on the record that there may be other claimants to these funds, and Judge Tenney specifically left open the question of returning the funds until after other claims against it were settled. Therefore, Bracewell can hardly be said to have been prejudiced by the later decision to use the money to reimburse the court

order the Government to furnish Bracewell with the money, and that since Judge Tenney had not ruled on the Government's request pursuant to 18 U.S.C. § 3006A(f) that issue was not ripe for appellate review. In view of this Court's opinion that the \$1,950 could be applied to the reimbursement of Bracewell's assigned counsel, and the failure of Bracewell to advance any cogent reason for Judge Tenney not to invoke the provision of 18 U.S.C. § 3006A(f), it is difficult to perceive what else Judge Tenney could do but order that the \$1,950 be used in accordance with the reimbursement statute.

appointed counsel. Moreover, six days after the sentencing the Government asked the Court to apply the \$1,950 to the reimbursement of the Treasury for the court-appointed lawyer. Bracewell can hardly show that he acted to his detriment because of the Government's initial statement at sentencing that the funds would be returned after the appeal assuming there were no valid claims for the money.

Finally, Bracewell argues that Judge Tenney's order constituted an illegal forfeiture. Bracewell's brief is not clear as to the basis for his argument. To the extent that Bracewell contends that the statute and procedure used by the District Court violated his due process rights, that claim must fail. The money was "taken" from Bracewell pursuant to a duly enacted statute, after notice to Bracewell. Bracewell was given a full opportunity to be heard on the issue, and he filed papers opposing the Government's motion to use the \$1,950 to reimburse the Treasury. Thus, his due process rights were not violated. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).*

* The one federal case cited by Bracewell is simply inapposite. In *McClendon v. Rosetti*, 460 F.2d 111 (2d Cir. 1972), this Court found a New York City ordinance in violation of the due process clause. Under the ordinance the police property clerk retained property belonging to an accused after the District Attorney had certified that the evidence was no longer needed, and the property was not contraband. This Court found that the owners of the property were deprived of the property without any meaningful notice, and that the maintenance by the city of the non-contraband property no longer needed as evidence was arbitrary. In the instant case Bracewell received notice and an opportunity to be heard. The reimbursement statute vindicates a sound public policy, and is a far cry from arbitrary legislative power.

CONCLUSION

The District Court order should be affirmed.

Respectfully submitted,

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Attorney for the United States
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RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Nathaniel H. Akerman being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 22nd day of November, 1977,
he served a copy of the within brief b. placing the same
in a properly postpaid franked envelope addressed:

Mark E. Arroll
261 Broadway
New York, New York
10007

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Nathaniel H. Akerman

Sworn to before me this

15th day of November
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6765450 Qualified in Kings Co.
Commission Expires March 30, 1978

